

## Advertising in the new media: a legal perspective on online-marketing and jurisdiction

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New technologies often provide new opportunities to advertisers but the ever-escalating popularity of the internet has signalled a new age in advertising, one of unparalleled potential for flexibility and unprecedented efficiency. Advances in technology are inevitably accompanied by questions concerning how they are to be treated by the law. Which legal frameworks should apply to the different forms of advertising present in the new media, and what restrictions are to be placed on them?

### Keyword advertising

Most internet users will frequently encounter adverts which appear alongside their search results if their search terms include particular keywords which have been selected by the advertiser. Many will be familiar with Google AdWords and the list of 'Sponsored Links' which is located on the right side of the page.

The advertiser's ability to select his desired keywords raises various questions, including whether the trademarks owned by another (such as a competitor) can be chosen as keywords to trigger an advert. Throughout the European Union this has been the subject of much debate, and the decisions of the courts have varied significantly. The legal question is centred upon whether one perceives the instruction of the search engine to display the advertisement if a user types in the keyword to constitute 'use as a trademark' of the protected term.

As an example, the German Federal Court of Justice (the BGH) had to decide on the matter in January 2009. However, as the court decided to refer the question to the European Court of Justice, it remains unclear whether the use of another's trademark as a keyword is permissible (BGH decision of 22 January 2009, Case No 1 ZR 125/07). One step lower in the hierarchy of German civil courts, the decisions of the Higher Regional Courts have differed greatly. The main course of reasoning adopted by those courts arriving at the conclusion that selecting the trademark as a keyword does not constitute using that term as a trademark, was that the user distinguishes between the regular

search index and the 'Sponsored Links'. Other courts contended that, even though the advertisements are clearly labelled as being such, the user still draws a connection between the keyword and the advert.

A decision on this issue will now have to be given by the ECJ, and not merely due to this referral by the BGH, the Cour de Cassation in Paris and the Austrian Supreme Court of Justice have also asked the ECJ to decide on similar questions. Any such decision, however, is not to be expected before 2010.

### Tracking and behavioural targeting

Information acquired through the collection and subsequent analysis of data pertaining to the online activity of various internet users provides advertisers with a highly valuable tool with which to optimise their activities. Google Analytics, and numerous other services, offer website operators detailed information relating to the use of their site, not merely the number of visitors to each page, but how they arrived at the site, the route they take through the site, where they exited the site and how much time they spent on each page, as well as their approximate geographic location. Website operators may be able to assess the relative popularity of various advertising campaigns and keywords used in search engine advertising.

With this information, the website operator can make alterations to his site (and related advertising) in order to achieve the desired flow of traffic, both to and through the site, and to maximise the number of sales.

It is unlikely that all users are aware that data is being collected. In accordance with the provisions of the national law which implement the European Directive on privacy and electronic communications (Directive 2002/58/EC), the website operator will usually be unable to collect and use personal data unless he has received the prior consent of the user. This raises the contentious issue of whether a user's IP address should be categorised as personal data.

The analysis of an internet user's behaviour need not be limited to his activity on one particular site, and the more an advertiser knows about the online activity of

his target demographic, the more precisely targeted his advertisements can be. A user's previous actions online, such as the search terms used and webpages visited, may indicate a likely interest in the product being offered. For users which have clicked on banner ads, pop-ups or search engine advertising, information concerning the times of day during which they are active online and their geographic locations may offer further opportunities to target potential customers with greater accuracy.

Various services available on the internet have attracted a significant level of attention from advertisers including social networking sites such as Facebook and MySpace. Adverts may be configured to appear based on specific words used in messages, or which utilise information in the profile of the user and those of his friends.

How an advertiser can acquire an internet user's permission to collect this data, and how such information is collected, used and transmitted are questions which require a contemplation of the applicable law.

#### Multiple jurisdictions and determining the applicable law

Due to a lack of territorial boundaries, most methods of advertising on the internet may have an impact in more than one jurisdiction. How issues concerning jurisdiction and applicable law in cyberspace are solved depends upon the nature of advertising activity and differs significantly according to where the issues are addressed. However, fundamental differences can already be seen when comparing the approaches taken by the US and the EU in dealing with the question of jurisdiction.

#### *The United States*

US courts, relying on common law, identify three general categories of websites in establishing whether personal jurisdiction exists in internet disputes:

- (1) **Active websites that permit users to actively conduct business** In this case jurisdiction is given in any location where a customer has conducted business with the company. A non-resident owner of a website is subject to personal (general) jurisdiction in a forum state, if his internet activities are continuous and purposefully directed into that forum state. This can be shown, for example, by advertising which has been directed to the forum state.
- (2) **Passive websites** Sites simply providing information or advertising not purposefully directed to the US market, should not lead to jurisdiction in the US.
- (3) **Websites that do not fit clearly into one of the aforementioned categories** If the owner of a website does not have sufficient contacts with the forum state for a US court to establish general jurisdiction, the court will look at the level of interactivity and commercial nature of the exchange of information that occurs on the website to determine if the exercise of jurisdiction is proper. If there is a

'minimum contact' with the US, personal (specific) jurisdiction over a non-resident owner of a website can be established in a forum state. Examples of such 'minimum contact' can be a physical presence, sales in the forum state, financial gain, choice of jurisdiction, etc. Therefore, in order to be subject to specific jurisdiction, the owner of a website must purposefully direct his activities to the forum state to such an extent that a claim arising from these activities and the exercise of jurisdiction in any given case will seem fair and reasonable.

#### *The EU*

In contrast, European courts generally rely on statutory law in order to establish whether jurisdiction exists. In transnational cases, they rely on the Brussels Regime, a set of international rules on jurisdiction and the enforcement of judgments in civil and commercial matters if the defendant has its domicile in a signatory state of these international treaties or within the EU. If these rules do not apply, the courts will apply their own (national) private international law. In general, these national statutory laws will provide for jurisdiction at the *registered domicile or seat of the defendant*. However, the Brussels Regime, as well as most of the relevant national statutes, stipulate four main alternative places of jurisdiction in matters relating to:

- (1) **Tort, delict or quasi-delict** In cases based on tortious behaviour such as, for instance, unfair competition, infringement of privacy and/or of intellectual property rights, jurisdiction may not only exist at the place where the conduct occurred but also at any forum state to which the relevant internet activities were purposefully directed.
- (2) **Contract** With regard to claims based on contract, eg, in case of a breach of a trademark license agreement by the licensee's inappropriate use of Google AdWords, jurisdiction may exist at the place of performance of the contractual obligations.
- (3) **The protection of consumers** According to the rules of the Brussels Regime, the court in the consumer's state will usually have jurisdiction if the internet activities are, by any means, directed to the consumer's state, or to a group of states including the consumer's state, and the claim arises out of these activities (similar to the US approach).
- (4) **The choice of jurisdiction** The parties may agree (within the limits of the law) that a particular court has exclusive jurisdiction. However, this only applies to transactions among businesses, as consumers cannot exclude by agreement the jurisdiction of the courts in the state within which they are domiciled.

Once the proper place of jurisdiction has been determined, the question of the applicable law arises. In the context of advertising online, this may prove to be a delicate issue and may lead to the conclusion that various different laws are applicable.

The impermissible activity in the context of online advertising may often constitute an act of unfair competition, an infringement of privacy and/or the infringement of intellectual property rights. As a consequence, with regard to unfair competition, the law of the affected market or of the affected markets will be relevant. In the context of infringement of privacy, the claimant can often choose between its own law, the law of the defendant or the law of the place of injury. Last but not least, in the context of intellectual property, it is usually either the law of the state within which the infringed right was protected or the law of the place where the violation took place. In online advertising, this can be the place of uploading, the place of downloading or the place of storing (therefore basically at any place of access via the internet).

With regard to compliance with restrictions on advertising provided by national public laws, the basic principle of territoriality should result in the applicability of the national law of any state in which those online advertising activities do take place as well as conferring jurisdiction upon that state. Whereas it could be argued that this would lead to the applicability of the national laws of every state from within which the advert on the internet could be accessed, it is to be assumed that the activities must somehow be directed to a certain state before they will be under an obligation to comply with that state's public restrictions on advertising.

For most of the new technologies used by the different forms of advertising present in the new media, it is yet unclear how the European or US courts will apply

the established rules on jurisdiction and applicable law in a cross-border context. The natural tendency of most courts worldwide to apply their own law whenever possible, when combined with the mostly borderless characteristics displayed by the new means of advertising, results in the need to carefully analyse for each method before it is implemented, in which states the use of it may lead to jurisdiction and which substantive law could become applicable. It is only this analysis that will enable compliance with the law and therefore allow the advertiser to manage the legal risks inherent to any online advertising activity.

#### Session at the Madrid 2009 IBA Annual Conference

At the Madrid 2009 IBA Annual Conference, the Product Law and Advertising Committee is organising a joint session with the Technology Law Committee on all of the aspects discussed in this article. The session will also cover various means of so-called 'search engine optimisation' (SEO) – the process of optimising the design of a website, in order to achieve a greater number of visitors. Another part of the discussion will deal with new developments relating to the sending of e-mails and text messages to consumers (including spam). As it is widely recognised that this method of advertising requires the consent of the recipient, the significant question remains how to obtain permission to legally distribute commercial e-mails. Under the Chair of the authors, various speakers will present the legal framework applicable to the different forms of advertising in the new media and will try to present answers to the many questions raised.

## IRELAND

# Comparative advertising: when the going gets tough, the tough get going

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As times get tough, consumers become more focussed on price, and businesses need to find ways to distinguish their products and offerings from those of their competitors. Comparative advertising and marketing can be a very useful tool for businesses in the current economic climate. However, advertising or marketing communications that compare products, product offerings or services with those of competitors must do so in an objective manner. The comparison

must be a truly objective overall comparison, and must not be misleading.

Anything less than a truly objective overall comparison could end up in litigation, whether for trademark infringement, breach of the Consumer Protection Act 2007 or breach of the regulations governing comparative advertising and comparative marketing communications.